No. 83-366

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENOBSCOT NATION,
APPELLANT,

v.

ARTHUR STILPHEN, COMMISSIONER,
DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF MAINE,
AND
JAMES E. TIERNEY, ATTORNEY GENERAL,
APPELLEES.

On Appeal from the Supreme Judicial Court
Of Maine

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Blanchard Press, Inc., Boston, Mass.—Law Printers

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This brief is submitted pursuant to Rule 16.5 of the Rules of the Supreme Court, in opposition to the Appellees' Motion to Dismiss which was filed on October 6, 1983.

Appellees' Motion to Dismiss, at pp. 2-3, argues that this Court lacks jurisdiction over the appeal because the Penobscot Nation never raised below a claim that:

> as applied, Section 6206(1) of the Implementing Act [30 M.R.S.A. §6206(1)] violates the laws of the United States.

It is true that the Penobscot Nation raised no such claim below, but flatly wrong that this claim is raised in this Appeal.

This action involves a challenge to enforcement of the state beano laws, not the Maine Implementing Act. Appellees totally miss the issue on Appeal clearly set out in the Jurisdictional Statement. The Penobscot Nation argued below and maintains on this Appeal that the Maine beano statute, 17 M.R.S.A. §§311 *et seq.*, "could not lawfully be applied to the Penobscot Nation's beano game" because of pre-emption by federal law. Jurisdictional Statement at 3-4. That issue was properly raised from the beginning of the action, it was addressed by the courts below, and it is squarely within the appellate jurisdiction of this Court.

Appellants' basic argument, presented in a number of different forms, is that this case turns only on a question of state law. Therefore, they conclude, this Court lacks jurisdiction to review the judgment below. Motion to Dismiss at 3; this case has no relevance to the decisions by other courts on Indian bingo, Motion to Dismiss at 4; it has no impact on other states, Motion to Dismiss at 6-7; and it rests on an adequate non-federal basis, Motion to Dismiss at 7.

As the federal bingo decisions hold, however, state bingo laws can only be applied to tribal bingo operations with the consent of Congress. Jurisdictional Statement at 4-5. Maine's jurisdiction over the beano operated by the Penobscot tribe to finance its governmental operations can only be upheld if that is what Congress intends, and that is solely a question of *federal* law. The Maine Implementing Act, 30 M.R.S.A. §6201 *et seq.*, gave Maine new jurisdiction over the Penobscot Nation only to the extent intended by Congress when it enacted the federal legislation. That intent can only be found by construing the applicable federal statutes in accordance with the governing federal case law. Jurisdictional Statement at 9-12.

In fact, the Appellees themselves rely upon the Maine Indian Claims Settlement Act, Pub.L. 96-420, 25 U.S.C. §1721 *et seq.*, for the state's right to regulate the Penobscot beano. Motion to Dismiss at 3, 5. Yet at the same time

Appellees contend that this federal statute can be construed and the status of the Penobscot Nation determined entirely without reference to federal law, on the premise that "federal Indian case law does not apply in Maine." Motion to Dismiss, at pp. 3, 5.

This same refusal to apply federal law was the fundamental error of the state courts below. Congress had no intention of rendering federal Indian law inapplicable to the Penobscot Nation by enactment of the Settlement legislation. Indeed, the Congressional Committee Reports on the Settlement Act cite the decisions in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), and *United States* v. *Wheeler*, 435 U.S. 313 (1978), to explain the effect of the legislation on the sovereign status of the Maine tribes. Sen. Rep. No. 96-957, 96th Cong., 2nd Sess., pp. 29-30. No federal legislation affecting a federally recognized tribe could properly be understood by ignoring the applicable case law on which Congress relies in this field.

The appellees, like the courts below, suggest in essence that Congress terminated the federal status of the Penobscot Nation. Congress plainly intended the contrary: it defined the Nation as a federally recognized tribe, 25 U.S.C.A. §1725(i), authorized the organization of its tribal government, 25 U.S.C.A. §1726(a), and incorporated the provision of the State Implementing Act that "tribal government. . .shall not be subject to regulation by the State". Sen. Rep. No. 96-957, 96th Cong., 2d Sess., p. 29. 30 M.R.S.A. §6206(1).

The application of these provisions puts this case in the same posture as similar cases involving other tribes. The question of pre-emption must be answered by a particularized inquiry weighing the tribal government interests against the state government interests to determine whether application of the state law would constitute an unlawful attempt to regulate tribal government and infringe on tribal sovereignty. Jurisdictional Statement at 5-9. The courts below failed to undertake this particulaized inquiry, or to construe the applicable statutes, in accordance with the decisions of this Court.

Appellees' Motion somehow turns both the Penobscot claim that federal law pre-empts the state beano statute, and the state's defense that the federal Settlement Act authorized its enforcement, into questions of state law. This stubborn refusal to accept the supremacy of federal law in this area should not be permitted to prevail. This Appeal raises important issues of federal Indian law which cannot be separated from the continuing nationwide controversy over Indian bingo operations. The issue requires resolution by this Court.

Respectfully submitted,

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